

Voivenel (Migration) [2018] AATA 123 (22 January 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Antonin Voivenel
CASE NUMBER:	1618716
DIBP REFERENCE(S):	CLF2013/17610
MEMBER:	Nicholas McGowan
DATE:	Monday 22 January 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 22 January 2018 at 1:05pm

CATCHWORDS

Migration – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – Genuine and continuing relationship – Claims of family violence – Types of evidence

LEGISLATION

Migration Act 1958, ss 5CB(2)(b), 5F(2)(c), 65, 375A

Migration Regulations 1994, rr 1.22-1.25, Schedule 2 cls 801.221(2)-(6)

STATEMENT OF DECISION AND REASONS

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 21 October 2016 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 18 January 2013 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The Tribunal conducted a public hearing on 18 January 2018. The applicant presented his claims and arguments in his oral evidence. A number of witnesses, including the applicant's psychologist, each provided oral evidence. The applicant has a migration agent, although not present at the public hearing. An interpreter was provided. The Tribunal has before it the Department's file relating to the applicant; its own file; and a copy of the Department's decision which the applicant provided the Tribunal.

5. BACKGROUND

6. The applicant was granted a Partner (Temporary) subclass 820 visa on 22 March 2013 on the basis of his spousal relationship with his sponsor.
7. On 21 June 2016 the applicant advised the Department in writing that his relationship with his sponsor had ceased.

8. ISSUE

9. During the public hearing the Tribunal pointed out to the applicant the requirement that he continue to be sponsored, and if not, the limited circumstances in which he may continue to be considered for the grant of permanent residence.
10. In the present case, the applicant states his relationship with his sponsor has ceased and he has been the victim of family violence perpetrated by his sponsor.
11. As the applicant in this case is no longer the spouse of his sponsoring partner, he is unable to satisfy a central requirement of subclause (2) of clause 801.221. The applicant may satisfy that clause by meeting the requirements of at least one of the subclauses (2A), (3), (4), (5), or (6).
12. There are no claims by the applicant or evidence before the Tribunal which would support a finding that the applicant can meet any of the subclauses other than subclause (6), which the applicant claims he meets.
13. Subclause (6) applies where the relationship has ceased and that either: the applicant or dependent child has suffered family violence committed by the sponsoring partner; or, there is a child to whom both the applicant and sponsoring partner have obligations in the nature of custody and/or contact/access. There is no claim or evidence that the applicant and his sponsor have any children together, or that the sponsor is deceased.
- 14.

15. **CONSIDERATION OF CLAIMS & EVIDENCE**

16. Division 1.5 of the Regulations contains the substantive provisions relating to family violence and sets out the evidentiary requirements for a claim of this nature. Under r.1.22 a reference to a person having suffered or committed family violence is a reference to a person being taken under r.1.23 to have suffered family violence.

17. ***Has a claim of family violence been made under the regulations?***

18. The Tribunal advised the applicant that further to his claim of suffering family violence perpetrated by his sponsor, he is required to provide the necessary evidence in order to establish a valid claim for family violence under Regulation 1.24(b) of the Migration Act.
19. In this case, there is no claim (or evidence) of judicially determined family violence.
20. The relevant evidentiary requirements to raise a non-judicial claim of family violence are in r.1.24. This requires a statutory declaration under r.1.25, and the type and number of items of evidence (two in this case) specified by the Minister in instrument IMMI 12/116.
21. The applicant has provided a statutory declaration (folios 91-101 on the Department file) which meets the requirements of the Regulations.
22. Two "Types of Evidence" must also be provided to raise a valid non-judicial claim.
23. A letter from "Relationship Therapist" Helen Conley (Department folio 81 and 172) does not meet the legislative requirements because Ms Conley's occupation is not one listed in Schedule 1.
24. The report from Psychologist Ian H. Mackinnon (folios 82-85 and 168-171 on the Department file) and letter dated 11 October 2016 (folio 213-212 and 217-219) do not meet the legislative requirements because they are not in the form of a 'Statutory Declaration', as required under Schedule 1.
25. The various documents from Dr Akaash Goyal (folios 86-90 and 175-178 in the Department file) do not meet the legislative requirements because they do not "identify the alleged victim". References are made to "...personal challenges he was going through in his marriage..." (folio 90) and, "He is going through some relationship challenges..."; however, nowhere does Dr Goyal articulate or imply that his patient (the 'applicant') is an "alleged victim", nor does Dr Goyal: "Detail the physical injuries or treatment for mental health that is consistent with the claimed family violence: Schedule 1), because it is not clear to the Tribunal that Dr Goyal is aware a claim of family violence has been made by his patient (the applicant). Accordingly, these documents do not meet the legislative requirements because they do not include the "detail" as required.
26. A number of statutory declarations were also provided, and are on the Department file (folio 108-117 and 173-174), including numerous statements by the applicant himself on both the Department and Tribunal file. None of these documents meet the legislative requirements as none claim has an occupation listed in Schedule 1 for the purpose of submitting a "Type of Evidence".
27. Given none of the 'Types of Evidence' discussed meet the Evidentiary Requirements as set out in Regulation; and none of the other documents on either the Department or Tribunal files meet the Requirements; a valid non-judicially determined family violence claim has not been made by the applicant.

28. **Other considerations**

29. The Tribunal notes the applicant submitted documentation which speaks to his current relationship (not with his sponsor) and his claimed child of that relationship (Tribunal file. folios 20-41). These may be aspects for consideration by the Department in any future (but separate) matter or visa application made by the applicant. They are not matters which are pertinent to the criteria under review for this visa application.
30. The Tribunal gave the particulars of a s.375A certificate (attached to the Department's file), and advised it believed the certificate was valid because of the reasons stated in that certificate and the nature of the folios (documents) it covers. The Tribunal provided an opportunity for the applicant to make any submission or comment in regards to the certificate. None was made.
31. As obliged under the Act, the Tribunal formally put to the applicant the information contained in the sponsor's withdrawal of sponsorship. The Tribunal offered the applicant the opportunity to comment on or respond to that information at the public hearing, or later, by agreement. Additionally, the Tribunal offered the applicant and his witness (in the absence of his agent the applicant's psychologist appeared keen to speak with his client) the opportunity to take a short adjournment of the review to allow the applicant an opportunity to discuss the applicant's desired course of action. The Tribunal explained to the applicant that it was prepared to take an adjournment to allow him to speak with his agent, and or grant additional time and adjourn the review to allow him the opportunity to consult with his agent or seek to instruct a new agent or solicitor. The applicant declined these invitations, and indicated to the Tribunal he did not have the financial resources to contest further even though he had concerns about the quality of his representation. The Tribunal placed no adverse weight on any detail in the files - including the department's referral to the Independent Expert (covered by the 375A certificate), as this case turned on matters contained in separate criteria.

32. **FINDINGS**

33. At the time of decision the applicant has made neither a judicially determined or non-judicially determined claim of suffering family violence in accordance with r.1.23. Accordingly, the Tribunal has no valid claim to consider.
34. Based on the applicant's own evidence, the Tribunal is satisfied that at the time of decision the applicant and his sponsor are not in a relationship which is genuine and continuing as required for the purposes of the Act under s.5F(2)(c) or s.5CB(2)(b). Accordingly, the applicant cannot satisfy the requirements of a spouse or de facto under the Act. Therefore, at the time of decision the applicant cannot satisfy the criteria in cl.801.221(2)(c) for the grant of the visa.
35. Furthermore, and given all the above, there is no evidence before the Tribunal that the applicant meets the alternative criteria in cl.801.221 (2A), (3), (4), (5) or (6).
36. For the reasons above, the Tribunal finds the applicant does not satisfy the criteria for the grant of the visa.

37. **DECISION**

38. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

1. * * * * *